UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 12,477

JAMES ODELL SMITH,
Appellee,

versus

NORFOLK AND WESTERN RAILWAY COMPANY,
Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA, AT WINSTON-SALEM. JOHNSON J. HAYES, DISTRICT JUDGE.

(Argued December 2, 1968. Decided March 4, 1969.)

Before HAYNSWORTH, Chief Judge, and BOREMAN and CRAVEN, Circuit Judges.

Hamilton C. Horton, Jr., (Craige, Brawley, Horton & Graham on brief) for Appellant, and Clyde C. Randolph, Jr., and Doris Greene Randolph (Randolph & Drum on brief) for Appellee.

CRAVEN, Circuit Judge:

James Odell Smith was employed by Baker Driveaway Company, Inc., which unloaded Chrysler cars for Norfolk and Western Railway Company at a place in North Carolina. While moving around on the top tier of an automobile-carrying railroad car, in the process of releasing the restraining chains on the Chryslers, Smith fell from the railroad car to the ground and was injured. In his damage suit against the railroad brought under the Federal Employers' Liability Act (45 U.S.C. §§ 1 et seq.) the district court entered summary judgment for Smith on the question of the applicability of the Act, drawing from the undisputed facts and his own inferences the conclusion that Smith was an "employee" of the railroad within the meaning of the Act. After final judgment entered upon a jury verdict for Smith, the railroad appealed the entry of summary judgment for Smith and the denial of its own motion for summary judgment. We affirm.

Though the Act in terms applies to "[a]ny employee of a carrier," it is settled that its protection extends in some circumstances to those injured workers not directly employed by the railroad itself. Though employees of independent contractors are not accorded coverage under the Act, *e.g.*, *Chicago, R.I. & P. RR. v. Bond*, 240 U.S 449 (1916); *Turpin v. Chicago, B. & O. R.R.*, 403 S.E.2d 233 (1966), if the injured worker is employed by an agent or adjunct of the railroad he will be treated as an employee of the railroad for purposes of the Act. *Pennsylvania R.R. v. Barlion*, 172 F.2d 710 (6th Cir. 1949); *Pennsylvania R.R. v. Roth*, 163 F.2d 161 (6th Cir.), *cert. denied*, 332 U.S. 830 (1947); *Cimorelli v. New York Central R.R.*, 148 F.2d 575 (6th Cir. 1945). Thus traditional concepts of agency extend the coverage of the Act.

In *Sinkler v. Missouri Pacific R.R.*, 356 U.S. 320 (1958), the Supreme Court allowed recovery to a railroad employee injured through the fault of the switching crew of an independent contractor. The concept of "operational activity" was invoked to extend coverage beyond the scope of ordinary agency, and was found to be sufficient alone to produce a finding of an agency relationship within the meaning of that phrase of the Act providing recovery for injuries *to railroad employees* resulting from the fault of "any of the officers, agents or employees" of the carrier. The doctrine of "operational activity" may be termed constructive agency, *i.e.*, an agency that is nonexistent absent the doctrine. It is said to arise out of a nondelegable duty of care to the employee, 356 U.S. at 329. In our case the plaintiff was *not* an employee of the railroad but, instead, was employed by the company held to be performing railroad functions.

We need not decide whether the *Sinkler* doctrine of "operational activity" properly extends to protect one who is not directly employed by the railroad. See *Hetman v. Fruit Growers Express Co.*, 346 F.2d 947 (3rd Cir. 1965). It is enough here that under traditional agency tests the decision of the district court that the undisputed facts establish agency does not appear erroneous. In support of that conclusion we need supplement the opinion of the district court only briefly.

One of the standard tests of agency is "whether or not the work is part of the regular business of the employer." Restatement (Second) of Agency § 220 (h) (1958). "Regular business" and "operational activity" are labels that obviously may be pinned on the same facts. They are not even sharply distinct in theory – for the first is one of the many tests of agency while the latter is alone sufficient

basis for finding the agency relationship. Operational activity aside, we think the nature of the work being done by Baker for the railroad here militates toward a finding of agency on standard agency principles. As Baker was unloading automobiles which the railroad had undertaken a contractual duty to unload, to that extent Baker was engaged in the regular business of the railroad.

Though historically and traditionally the railroad is responsible neither for loading nor for unloading, *see Casella v. Norfolk & Western Ry.*, 381 F.2d 473 (4th Cir. 1967), an exception exists for the care of cargo in transit or for assembly and redistribution of cargo in a railroad-operated depot. The necessary care of cattle on long hauls was an early illustration of this exception. But yesterday's cattle may be today's Chryslers. These units to be unloaded had a retail value measuring thousands of dollars each. Additionally, the capacity of a specially designed railroad car and the assortment of styles and models ordered by a given dealer make it impractical for dealers to accept carload lots on their own siding as with many other commodities. As the railroad here contracted with the shippers specifically to assume the duty of unloading these valuable commodities and to be paid for their services through the unloading stage, the freight yard at which Baker unloaded these units may be regarded not unreasonably as merely a redistribution point in the shipping of these cars. The contract with Baker engaged Baker to perform the unloading, which duty had been specifically assumed by the railroad as part of its regular business. Thus the situation here meets a further test of agency in addition to those emphasized by the district court. *Accord, Pennsylvania R.R. v. Barlion, supra; Pennsylvania R.R. v. Roth, supra; Cimorelli v. New York Central R.R., supra; Downs v. Bal-*

timore & O. R.R., 345 Ill. App. 118, 102 N.E.2d 537 (1952). *But cf. Tarboro v. Reading Co.*, 396 F.2d 941 (3rd Cir.), *cert. denied*, 37 U.S.L.W. 3246; *Hetman v. Fruit Growers Express Co.*, 346 F.2d 947 (3rd Cir. 1965); *Del Vecchio v. Pennsylvania R.R.*, 233 F.2d 2 (3rd Cir.), *cert. denied*, 352 U.S. 909 (1956); *Dougall v. Spokane, P. & S. Ry.*, 207 F.2d 843 (9th Cir. 1953), *cert. denied*, 347 U.S. 904 (1954).

Affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

#C-58-WS-66

JAMES ODELL SMITH, Plaintiff

v.

NORFOLK AND WESTERN RAILWAY COMPANY, Defendant

MEMORANDUM OPINION

Dated April 26, 1967

GORDON, District Judge

This case is before the Court on cross motions of the plaintiff and defendant for summary judgment.[1] For purposes of these motions, the parties have stipulated that there are no salient facts in dispute. Even so, it is the duty of this Court to determine whether there are factual matters in dispute making summary judgment improper.[2] The facts about the accident are not in dispute. This Court finds that the questions of the applicability in this case of the Federal Employers Liability Act,[3] and the Federal Safety Appliances Act,[4] are basically questions of law which are properly decided by this Court on motions for summary judgment.[5]

Pursuant to Rule 56(d), this Court finds that the following material facts exist without substantial controversy:

1. On December 23, 1965, the plantiff, James Odell Smith, sustained certain injuries when he fell from the top deck of a railway car used to transport automobiles. The plaintiff was performing his job of releasing or "breaking" the chains which secure the automobiles to the railway car. After "breaking" the chains, the

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1. 28 U.S.C., Rule 56, Federal Rules of Civil Procedure
2. 3 Barron & Holtzoff 176, § 1239 and cases cited therein.
3. 45 U.S.C. § 51, et sequitur.
4. 45 U.S.C. § 1, et sequitur.
5. After the motions for summary judgment were made, the parties stipulated that the Court could answer these questions without the intervention of a jury, and leave the questions of common law negligence and damages for jury trial. Thus, the Court has power under either Rule 56 or as a fact finder in lieu of the jury.

plaintiff routinely drove the automobiles down off the railway cars on portable ramps he had helped place there for that purpose.

2. The plaintiff was nominally employed, at the time of this accident, by Baker Drive-Away Company, Inc., a Michigan corporation. This company unloaded Chrysler automobiles for the defendant, Norfolk & Western Railway Company, from railway cars hauled to the Winston-Salem freight yards of the defendant. The defendant received a tariff for hauling the automobiles which included unloading the railway cars at the destination in Winston-Salem.

3. The defendant paid Baker Drive-Away a standard unloading charge per car. However, these payments were not made for some time after the unloading operations had begun in August, 1964, ostensibly because the parties were negotiating a contract. A written contract was finally executed on May 1, 1966.

4. Baker Drive-Away ostensibly rented certain sheds and portions of the defendant's freight yard to carry on the business of unloading the automobiles beginning in January, 1965. However, rent was not paid to the defendant until January, 1966.

5. Most of the tools necessary to perform the unloading operation were supplied by the defendant railroad, including large metal-wheeled and rubber-wheeled portable unloading ramps and the ratchet bars used to "break" the chains securing the automobiles to the railway cars. The defendant also repaired the tools when necessary.

6. Employees of the defendant kept loss reports on the cars on a daily basis, and influenced the manner of unloading by making it known that they were watching on one occasion the unloading operation. An employee of the defendant criticized the plaintiff for driving off the cars too fast.

7. The railway car from which the plaintiff fell is equipped with a cable railing device which can be raised to be used as a hand rail. This cable railing was not in the raised position at the time of the accident.

The questions of law to be determined by this Court are (1) whether the Federal Safety Appliance Act applies to this case, and

(2) whether plaintiff is an "employee" of the defendant railroad for purposes of the Federal Employers' Liability Act.

On the question of whether the Federal Safety Appliance Act applies to this case, attention is directed to *Atlantic Coast Line v. Shields.*[6] In that case, the Supreme Court held that a dome running board on a railroad tank car was a safety appliance with the Safety Appliance Act, not withstanding the failure of the Interstate Commerce Commission to specify uniform standards for such boards. That case is distinguishable from the case at bar by the fact that the Commission had promulgated regulations in 1911 providing in detail for "one running board running around the perimeter, or at least the full length of the sides, of tank cars."[7] Thus, running boards on tank cars were expressly made safety appliances on railroads by the ICC. However, in our case, running boards on these automobile railway cars have not been expressly made safety appliances by the ICC. This Court is unwilling to expand the Federal Safety Appliance Act beyond the bounds set by Congress and the Supreme Court to date.[8]

The question of whether an injured plaintiff is an "employee" of the defendant railroad for purposes of the Federal Employer's Liability Act is one which has plagued the courts for years.[9] The question really boils down to whether the plaintiff worked for an "independent contractor" or a mere "agent" of the railroad as those terms are known in legal contemplation. [10] This Court is led to consider various factors generally considered by the courts when confronted by this issue.[11]

The plaintiff relies quite heavily on *Sinkler v. Missouri Pacific Railroad Co.*[12] This case actually dealt with the question of who

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6. 350 U.S. 318, 100 L.Ed. 364, 76 S. Ct. 386 1955).
7. Ibid, 100 L.Ed. at 367 citing 49 C.F.R. §§ 131.8(b), 131.9(c).
8. See also *Baltimore & Ohio Railway Co. v. Jackson*, 353 U.S. 325, 1 L.Ed.2d 862, 77 S. Ct. 842, *reh den* 354 U.S. 943, 1 L.Ed.2d 1542, 77 S. Ct. 1391 (1957).
9. See Annotation in 30 A.L.R.2d 517, "Injured or killer person as employee of carrier or independent contractor with respect to Federal Employer's Liability Act." (1953).
10. Ibid, at p. 520.
11. Restatement of the Law, Agency 2d, Vol. 1 § 220. This authority is cited with approval by the Supreme Court on this issue in *Baker v. Texas & Pacific Railway Co.*, 359 U.S. 227, 3 L.Ed.2d 756, 79 S. Ct. 664 (1959).
12. 356 U.S. 326, 2 L.Ed.2d 799, 78 S. Ct. 758 (1958).

is an "agent" of the railroad within the meaning of § 1 of the FELA[13] for purposes of determining who is at fault. The question in the case before this Court is who is an "employee" of the railroad for purposes of determining who can recover under the Act. Even so, the "operational activities" test would seem to be but another way of stating one of the tests recommended in the Restatement of Agency 2d, § 220: " . . . (h) whether or not the work is a part of the regular business of the employer." The "operational activities" of the railroad would seem to be the same thing as the "regular business" of the railroad.

This Court is of the opinion that Baker Drive-Away was doing the regular business of the defendant railroad in unloading the automobiles from the railway cars for the railroad. The indicia of mere agency as opposed to independent contractor status is legion: Nor particular expertise or training and skill was necessary to do the unloading work. The contractor, Baker Drive-Away, did not deal generally with the public in providing this unloading service. Baker Drive-Away used the facilities of the railroad without paying rent until after the accident. The Railroad supplied the tools for the unloading operation and repaired them when necessary. Baker Drive-Away employees worked at the whim of the railroad: if many cars were to be unloaded, they worked a lot; if few cars, they worked seldom. The time period was continual; there was no standard job to finish after which the contractor would move on to other work. Damage was accounted by the railroad daily and influence was exerted by the railroad over the method of unloading in order to minimize this damage. The evidence rises to the substantiality required by the cases[14] to find plaintiff to have been, in effect, an "employee" of the railroad when he was injured. Thus, he is entitled to the benefits of the Act.

The defendant places great reliance on a recent case from the Missouri Supreme Court.[15] At first blush, the case seems to be factually similar to the case at bar but, in reality, there are a num-

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13. 45 U.S.C. § 51.
14. See, in addition to the cases cited, above, *Cimorelli v. New York Central Railroad Co.*, 6 Cir., 148 F.2d 575 (1945); *Pennsylvania Railroad Co. v. Roth*, 6 Cir. 163 F.2d 161 (1947); *Pennsylvania Railroad Co. v. Barlion*, 6 Cir., 172 F.2d 710 (1949);
15. *Turpin v. Chicago, Burlington & Quincy RR*, 403 S.W.2d 233 (Mo. S. Ct. 1966).

ber of distinctions which weaken its influence on the Court in this case. In the *Turpin* case, plaintiff was employed by a motor carrier which brought its trailers to the train and loaded the trailers on flat cars in what is known as "piggy-back" fashion. The railroad pulled the piggy-back cars to the destination, where the motor carrier unloaded the trailers. This operation of loading and unloading fully loaded trailers onto railway cars is obviously a job requiring an expertise which only the motor carriers was equipped to supply. In addition, the motor carrier supplied all the tools for the work and supervised the whole operation. Finally, the railroad's compensation was apparently only for the rail carriage, and did not include the unloading operation.

For the reasons stated above, this Court grants the plaintiff's motion for summary judgment on the issue of the plaintiff's coverage by the Federal Employer's Liability Act, and therefore denies the defendant's motion on that issue.

However, the Court grants the defendant's motion for summary judgment on the question of the coverage of the Federal Safety Appliance Act, and therefore denies the plaintiff's motion on that issue. Judgment conforming with this Memorandum Opinion will be entered.

/s/ EUGENE A. GORDON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

#C-58-WS-66

JAMES ODELL SMITH, Plaintiff
v.
NORFOLK AND WESTERN RAILWAY COMPANY, Defendant

ORDER

Upon motions for summary judgment filed by plaintiff and defendant in the above action, and after considering written briefs and oral arguments of counsel, it is
ORDERED:

1. Plaintiff's motion for summary judgment adjudicating that, at the time of the injuries referred to in the Complaint, defendant owed plantiff such duties as are imposed by the Federal Employers Liability Act, 45 U.S.C., Sec. 51, et seq., is allowed. It is further ordered that at the time of the accident referred to in the Complaint, and with respect thereto, plaintiff was an employee of defendant for purposes of this action.

2. Plaintiff's motion for summary judgment adjudicating that he is not precluded from maintaining this action on account of acceptance of benefits under the North Carolina Workmen's Compensation Act, N.C.G.S. 97-1, et seq., is allowed.

3. Defendant's motion for summary judgment dismissing the allegations of the Complaint insofar as they relate to any violation by defendant under the Federal Safety Appliance Act, 45 U.S.C.A., Sec. 1, et seq., is allowed. It is further ordered that plaintiff's claim under the Federal Safety Appliance Act, 45 U.S.C.A., Sec. 1, et seq., is dismissed.

4. Defendant's motion for summary judgment dismissing the allegations of the Complaint insofar as they assert any duty owed

plaintiff by the defendant under the provisions of the Federal Employers Liability Act, 45 U.S.C.A., Sec. 51, et seq., is denied.

5. Defendant's motion for division of issues separating the asserted liability under the Federal Employers Liability Act, 45 U.S.C.A., Sec. 51, et seq., from questions of common law legiligence and damages, is denied.

/s/ EUGENE A. GORDON
United States District Judge

Dated at Winston-Salem, North Carolina September 15, 1967.